2. The opinion of the District Court upon the merits is reported in 178 F. Supp. 742. Its opinion denying the petitioner's motion to dismiss and its later opinion denying petitioner's motion to transfer the action to the Southern District of California under 28 United States Code, section 1404(a) are not reported. The opinions of the District Court are annexed hereto in Appendices B, C and D, respectively, to this petition.

JURISDICTION

The judgment sought to be reviewed was entered on January 23, 1961. A timely petition for rehearing was filed by the petitioner on February 10, 1961, and was denied on February 21, 1961. The judgment is annexed hereto as Appendix E to this petition. The order denying rehearing is annexed hereto as Exhibit F.

The jurisdiction of this Court is invoked under 28 United States Code, section 1254(1), on the grounds that the Court of Appeals has (1) decided important questions of state law in a way not in accord with the applicable law of California and (2) has sanctioned such a departure by a lower court from the accepted and usual course of judicial procedure as to conflict with applicable law and to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

1. In deciding that the respondents' claimed interest in the proceeds from California oil and gas production was not an interest in real property, did the Court of Appeals decide an important question of California law in a way in conflict with applicable California decisions?

2. If so, two subsidiary questions are presented:

(a) Was Fox Realty Corporation of California (herein referred to as "Fox Realty"), as owner of the real property and lessor, an indispensable party to the action, and

(b) did the Texas District Court have jurisdiction to try a local action involving interests in California real property?

3. In an action brought principally by California citizens in a federal court in Texas upon a contract, made and to be performed in California, affecting real property in California, involving intricate questions of California law, in which most of the lay witnesses are residents of California and none of whom is a resident of Texas, and in which Texas has no relationship to the transaction from which the action stems, has the Court of Appeals, by affirming the denial of a motion to transfer, sanctioned a radical departure from accepted standards of judicial procedure, the effect of which is to nullify 28 United States Code, section 1404(a)?

STATUTES INVOLVED

The case is controlled principally by Rule 19 of the Federal Rules of Civil Procedure and by the decisional law of California. The principal statute involved is the Act of May 24, 1949, c. 139, § 81, 63 Stat. 101 (28 U. S. C. § 1404[a]):

> "For the convenience of parties and witnesses in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

This action was commenced by respondents on April 9, 1958, in the United States District Court for the Northern District of Texas, said court having jurisdiction solely by virtue of diversity of citizenship then existing among the parties.*

The action involves the claims of respondents under certain contracts made in 1943 by the Janss Investment Corporation (herein referred to as "Janss Investment") and Fox Hills Realty Company (herein referred to as "Fox Hills"), on the one hand (said corporations being the purported predecessors of respondents), and petitioner and certain of its wholly owned subsidiaries. The asserted claim is to a portion of the proceeds derived from the production of oil and gas on certain real property located in Los Angeles, California.

A. Factual Background of the Case.

1. The parties and others interested in the case.

All of the respondents are said to be successors in interest of Janss Investment and Fox Hills with respect to the rights asserted in the action. The plaintiffs who are residents of California (the Janss family) together have over 75% of the total claim (R. 212).

Janss Investment is a Delaware corporation entirely owned by members of the Janss family, all of whom are

*The action was commenced shortly before the passage of the act of July 25, 1958, 72 Stat. 415 (28 U. S. C. § 1332[c]), making a corporation a citizen both of the state of its incorporation and of the state in which its principal place of business is located. Petitioner is a Delaware corporation with its principal place of business located in the State of New York. Since two of the respondents are citizens of New York, it is apparent that complete diversity of citizenship would have been defeated under the provisions of section 1332(c). See *Strawbridge* v. *Curtiss*, 3 Cr. 267, 2 L. Ed. 435 (1806).

voluntary plaintiffs. Janss Investment owned the majority of the stock of Fox Hills, formerly a California corporation and now dissolved (R. 415, 422, 605-6). Neither Janss Investment nor Fox Hills is a party to this action.

Petitioner is a Delaware corporation, with its principal place of business located in the State of New York. It is engaged in the production and distribution of motion pictures.

Fox Realty is a California corporation, which is wholly owned by petitioner. It owned various real properties, including the motion picture studio property involved in this case. It is also the lessor under the oil and gas lease involved in this case (R. 1800). Fox Realty is not a party to this action, although petitioner contends that it is indispensable to the maintenance of the action.

Universal Consolidated Oil Company (hereinafter referred to as "Universal") is a California corporation engaged in the production of oil and gas. It is the lessee under the oil and gas lease involved in this case (R. 1800). It is not a party to this action.

2. The 1943 contracts.

The real property affected by this action is located in Los Angeles, California, adjoining the city of Beverly Hills, California, and consists of approximately 286 acres. It was acquired in three separate transactions. A predecessor of petitioner acquired approximately 99 acres of said property from Janss Investment in 1924 for a cash consideration of $300,000 (P. Ex. 1, R. 1694). The deed recited a restriction which prohibited the drilling of any oil or gas well on the property. In 1936 a subsidiary of petitioner purchased from Fox Hills an additional portion of said property totaling approximately 98 acres for a cash consideration of approximately $540,000 (P. Exs. 4 and 6, R. 1698, 1701). The 1936 deeds contained similar

prohibitions against the drilling of oil and gas wells on the property.

The remainder of the studio property (approximately 89 acres), was acquired by Fox Realty in 1943 from Fox Hills. The 1943 transaction was evidenced by two contracts. Insofar as pertinent here, these contracts provided that Fox Realty would acquire the remaining 89 acres and the former drilling restrictions on the parcels previously acquired would be modified or eliminated. As consideration therefor, Fox Realty and petitioner agreed to pay the sum of $491,419.50 and, in addition:

> "* * * an amount equivalent to eight and one-third per cent (8⅓%) of the proceeds of all oil, gas, other hydrocarbons and other associated substances, produced and saved from wells bottomed under [the property] * * * without deducting for charges of any kind whatsoever * * * and * * * an amount equivalent to fifty per cent (50%) of any bonus payment or payments of land rentals (distinguished from payments of oil and gas royalties as the term 'royalties' is generally understood and defined in connection with the construction thereof in oil and gas leases) paid as consideration for making and entering into any lease for the extraction of oil, gas, other hydrocarbons and other associated substances from wells bottomed under [the property] * * *." (P. Ex. 15, R. 1737-8; P. Ex. 16, R. 1756-7).

The foregoing provision and its interpretation control the merits of the action.

3. The 1952 Oil and Gas Lease between Fox Realty and Universal.

An oil and gas lease was entered into as of March 21, 1952, between Universal and Fox Realty (P. Ex. 65, R. 1800). Under the terms of the lease, Universal agreed to pay to Janss Investment and Fox Hills amounts equiva-

lent to 8⅓% of the proceeds from all hydrocarbons extracted from the 280 acre studio property. Said 8⅓% was called the "Janss share" in the lease. Fox Realty reserved a basic royalty of 11⅔% for itself. Fox Realty also reserved a 50% "variable participating royalty", which interest constituted 50% of the net profits to be realized by Universal under the lease, determined in accordance with a formula contained in the lease. The lease contained no provision for the payment of "bonus" or "rentals".

Oil was discovered in February, 1954. Sustained production commenced later and royalties have accrued during each month since January, 1956. The 8⅓% "Janss share" has been continuously paid by Universal to respondents and is not involved in the action (D. Ex. 112). At the time of the trial, no variable participating royalty payments had yet become due (D. Ex. 111).

B. The Proceedings Below.

1. The nature of respondents' claims.

Respondents claimed in their Second Amended Complaint (upon which the case was tried) that, under the terms of the 1943 contracts, all consideration provided in the 1952 Universal lease was to be shared equally between Fox Realty and respondents. The basis of this claim was in the alternative: (1) that all lease consideration in excess of a "basic" 16⅔% royalty constituted "bonus" or "land rentals" paid as consideration for making and entering into an oil and gas lease, of which respondents were entitled to one-half; (2) if the contracts did not mean, as a matter of law, what respondents claimed, then the contracts were ambiguous and it was the intention of the parties to provide for an equal sharing of all lease consideration.

2. The Motion to Dismiss.

Prior to filing its answer to the original complaint, petitioner moved to dismiss the action on several grounds. First, petitioner argued that the action involved a claimed interest in California real property, the owner of which—Fox Realty—was an indispensable party. The joinder of Fox Realty would have destroyed jurisdiction because Fox Realty is a California corporation and most of the respondents are also California citizens. Second, petitioner argued that the action was a "local" action and that only a court sitting in California could adjudicate respondents' purported interest in the California real property (R. 57-8). The District Court denied the motion (Appendix, p. 33a-38a), although it acknowledged that the motion would have to be granted if the action indeed involved a claim to California real property (Appendix, p. 36a).

In subsequently adopted findings and conclusions, the court determined that "this is not a suit for California land and does not involve title to real property or any interest therein in that state, but is instead a suit on a personal covenant made by defendant to pay money" (Finding of Fact No. 2, R. 180; Conclusion of Law No. 5, R. 81). At the trial, petitioner renewed its motion to dismiss at the close of plaintiffs' evidence (R. 1108-71) and it was again denied (R. 1173).

The Court of Appeals affirmed the District Court's denial of the motion to dismiss on the ground that petitioner "was at no time in the chain of title" to any of the real property rights referred to in the 1943 contracts and that its sole interest in said contracts was due to a personal covenant to pay money (Appendix, p. 14a). The Court of Appeals held that "the action is not one dealing with an interest in realty." (Appendix, p. 13a).

3. The Motion to Transfer the Action to the Southern District of California.

Following the denial of the motion to dismiss, petitioner moved to transfer the action to the United States District Court for the Southern District of California on the grounds of convenience of the parties and witnesses and in the interest of justice, pursuant to 28 United States Code § 1404(a). Respondents resisted the motion principally on the ground that the matter could be brought to trial more rapidly in the Northern District of Texas and that few witnesses would be needed at the trial. The District Court denied the motion (Appendix, p. 39a-41a). The Court of Appeals affirmed on the ground that, since the trial court conducted a full hearing on the motion and apparently gave consideration to the convenience of the parties and the witnesses, it did not abuse its discretion (Appendix, p. 15a).

4. The District Court's decision on the merits.

The judgment of the District Court gave full effect to respondents' claims, awarding them one-half of the variable participating royalty, and one-half of the so-called "3⅓% royalty."*

5. The Court of Appeals' decision on the merits.

The Court of Appeals reversed the District Court with respect to its award to respondents of one-half of the so-called 3⅓% royalty. It held that all consideration beyond the "usual" royalty was not necessarily "bonus" as a matter of law, and that the 3⅓% royalty was "royalty" and not "bonus". The Court of Appeals affirmed the District

*The Universal lease provided for a basic 20% royalty. The difference between this and 16⅔%, which respondents claim was the "usual" or "standard" royalty in California, is the "3⅓% royalty". Respondents claimed one-half of the 3⅓% royalty or, in other words, that the 20% was to be divided equally.

Court's award to respondents of one-half of the variable participating royalty, holding that a net profits interest is "bonus" in which respondents are entitled to share equally.

REASONS FOR GRANTING THE WRIT

1. In deciding that the respondents' claimed interest in the proceeds from California oil and gas production was not an interest in real property, the Court of Appeals decided an important question of California law in a way in conflict with applicable California decisions.

The Court of Appeals held that the action does not involve interests in real property. This was a most important consideration since, as the Court of Appeals stated, two contentions were resolved by this single determination (Appendix, p. 13a). First, if the action involved interests in real property, then Fox Realty, the owner of the property, was an indispensable party. Second, if the action involved interests in real property, then the action was local rather than transitory and only a California court at the situs of the realty had jurisdiction. The Court of Appeals held that, as against the petitioner, the suit did not involve real property because petitioner was not in the chain of title to any of the property interests referred to in the 1943 contracts. Petitioner's role was found to be solely that of a promisor of a personal covenant to pay money.

The analysis of the court misses the point. We will assume that as against petitioner the suit sounds in contract. The transcendent fact is, however, as we will show, that the very contract upon which the claim is asserted is itself regarded by the law of California as creating in respondents an interest in real property. Consequently, any determination of the contract rights of respondents, regardless of against whom they are asserted, necessarily adjudicates the

magnitude of the rights of the owner of the real property —Fox Realty. The pertinent inquiry is not to a characterization of the nature of petitioner's interest in the suit but rather to the nature of the respondents' interests and the necessary impact of the suit upon the real property rights of Fox Realty. That inquiry, we say, is an inquiry into California law. There is not a word in the Court of Appeals' decision analyzing the controlling California cases which unmistakably treat the interests claimed by the respondents as interests in real property.*

The California law is clear. In *Callahan* v. *Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935), California adopted the non-ownership or qualified ownership theory with respect to oil and gas rights and specifically rejected the "ownership in place" philosophy. Though repudiating the suggestion that the landowner owns the minerals in place underlying the surface of his property, the court held that the landowner's assignee of a fractional portion of the oil, gas, etc. produced and saved from the land owned an interest in real property. That interest was described as "an interest or estate in real property in the nature of an incorporeal hereditament." (43 P. 2d at p. 792). The interest of a lessee under an oil and gas lease was described as "an interest or estate in real property in the nature of a profit *a prendre*, which is an incorporeal hereditament." (Ibid.)

In *County of Los Angeles* v. *Continental Corp.*, 113 Cal. App. 2d 207, 248 P. 2d 157 (1952), the court held that a "drilling and operating agreement" was "substantially the equivalent" of an oil and gas lease and that de-

*It was not disputed in the Court of Appeals that California law governed in the construction of the contracts (Appendix, p. 6a). However, on the issue of the nature of the interests involved, the controlling California law was ignored.

fendant's interest in the agreement was taxable as an interest in real property. It did not matter that the interest was created in a contract rather than a lease, since "the designation which the parties to an agreement see fit to affix to it, is not controlling as to its legal effect" (248 P. 2d at p. 168). Thus, under California law, interests in oil and gas to be produced in the future, while not constituting absolute ownership of the oil and gas in place, do represent incorporeal interests in real property.

The important question in this case was whether, under the 1943 contracts, respondents' alleged predecessors acquired an interest in oil and gas. If so, those interests are incorporeal interests in real property. California courts have held that contracts such as the 1943 contracts do create incorporeal real property interests. *Recovery Oil Co.* v. *Van Acker,* 79 Cal. App. 2d 639, 180 P. 2d 436 (1947), was an action by a lessee to quiet title. Defendant was the assignee of "the proceeds from fifteen per cent (15%) of the oil, gas and other hydrocarbon substances" produced from the premises. The trial court quieted plaintiff's title on alternative grounds, one of which was that the assignments—which referred to "proceeds" from oil and gas production and not to a specified portion of oil and gas as such—did not create interests in the real property but constituted merely a personal covenant to pay money out of a specified fund (which was essentially the holding of the court below in the instant case). The California District Court of Appeals reversed. It held that it made no difference if the instrument referred to "proceeds" rather than to oil and gas as such. In a subsequent appeal in the case, the same court characterized the assignee's interest as "an interest in real property" and held it be "vested as an estate." *Recovery Oil* v. *Van Acker,* 96 Cal. App. 2d 909, 216 P. 2d 483, 485 (1950). To the same effect see

Schiffman v. *Richfield Oil Co.*, 8 Cal. 2d 211, 64 P. 2d 1081, 1083 (1937), and *Taylor* v. *Taylor*, 167 Cal. App. 2d 120, 334 P. 2d 201 (1959). See also *Chase* v. *Trimble*, 69 Cal. App. 2d 44, 158 P. 2d 247 (1945) ("a sum equal to one-eighth of the market price of all oil produced") and *La Laguna Ranch Co.* v. *Dodge*, 18 Cal. 2d 132, 114 P. 2d 351, 355 (1941): "the purpose and scope of all such royalty interests," however created, "are so similar that all should be considered equally to be incorporeal interests in real property * * *."

There can be no question that under California law, a contract to pay a fractional portion of the proceeds of oil and gas production creates in the recipient an incorporeal interest in real property. That is precisely what the 1943 contracts provide and that is precisely their effect. In holding otherwise, the Court of Appeals decided an important question of California law in a way in conflict with applicable California decisions.*

---

*We are, of course, mindful of this Court's practice to defer to the decisions of lower courts in construing state laws. *E.g.*, *General Box Co.* v. *United States*, 351 U. S. 159 (1956). But this practice, soundly based on the presumed familiarity of local judges with local law has no application where, as here, the lower Federal judges are not sitting in the jurisdiction whose substantive law is applicable. Neither the Court of Appeals nor the District Court has any special familiarity with the law of California. See, e.g., *Propper* v. *Clark*, 337 U. S. 472, 486-87 (1949) ("* * * we are hesitant to overrule decisions by federal judges skilled in the law of particular states"); *Steele* v. *General Mills*, 329 U. S. 433 (1947); *Sims* v. *United States*, 369 U. S. 108 (1959); *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1944).

2. The respondents' claimed interests under applicable California law are interests in real property. Therefore:

(a) Fox Realty, as owner of the real property and lessor, was an indispensable party.

Neither the District Court nor the Court of Appeals disputed the fact that Fox Realty would be indispensable if the action involved real property.* Why then did the courts below fail to dismiss the action?

The District Court's refusal to do so was based on the erroneous assumption that the suit involved only a claim to money already derived from oil and gas production and thereby related to "severed" oil and gas proceeds, an interest in personalty like severed timber. This was a clearly erroneous assumption since the essence of the suit involves the proceeds of oil to be produced in the future. The heart of the case is repondents' claim to one-half of the variable participating royalty, none of which had accrued at the time the complaint was filed.

The Court of Appeals, as we have noted, concluded that the action did not involve real property since petitioner was not in the chain of title to any of the property interests referred to in the 1943 contracts and its role was therefore said to be merely that of a promisor on a personal covenant to pay money. The Court of Appeals missed the point. Regardless of whether or not the action against petitioner can be characterized as contractual in nature, the interest of Fox Realty necessarily arose since it was the fee owner of real property in which respondents claim an interest measured by the proceeds of oil and gas production. Plainly, a

---

*" * * * the Court must decide if the declaration in the complaint calls for an adjudication of the title of real property. If it does, then the defendant's motion to dismiss should we think be sustained." (District Court opinion on motion to dismiss, Appendix, p. 36a).

"Both (parties) seem to agree that if it were such a suit touching on real property Fox Realty would be an indispensable party." (Court of Appeals Opinion, Appendix, p. 13a).

decree adjudicating the magnitude of one party's rights in real property necessarily affects correlatively the remaining real property rights of the other owners of the property whether they are parties or not.* Accordingly, Fox Realty's quantum of rights in the real property has been substantially and adversely affected by the decision awarding respondents an augmented share of the real property, based upon the construction of the 1943 contracts. See *Calcote* v. *Texas Pac. Coal & Oil Co.*, 157 F. 2d 216 (5th Cir. 1946), *cert. den.*, 329 U. S. 782; *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971 (5th Cir. 1946); *Fouke* v. *Schenewerk*, 197 F. 2d 234 (5th Cir. 1952); *Whelan* v. *Placid Oil Co.*, 198 F. 2d 39 (5th Cir. 1952); *State of Washington* v. *United States*, 87 F. 2d 421 (9th Cir. 1936).**

---

*The "legal" rights of Fox Realty cannot be concluded of course since, as a non-party, it is not bound by the judgment. Restatement of Judgments § 93. But under Rule 19 of the Federal Rules of Civil Procedure the adverse effect contemplated is a "practical" rather than a legally conclusive effect. See *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971, 973 (5th Cir. 1946).

**Unquestionably, California law controls the question of the nature and extent of Fox Realty's interest. As the court put it in *Baker* v. *Dale*, 123 F. Supp. 364, 367 (W. D. Mo. 1954):

> "While the need to join 'indispensable parties' and the permissive right to join parties who are 'not indispensable,' in an action pending in the Federal Court, is procedural, and, hence, governed solely by rules of procedure applicable in the Federal Court, particularly Rule 19 of the Federal Rules of Civil Procedure * * * yet the matter of who constitute 'indispensable parties,' in a particular case, depends upon the nature of the right in suit and that, in turn, depends upon the substantive law of the state, and, therefore, it is necessary to examine the law of the state to determine the nature of the right and to whom it is given in order to determine who are 'indispensable parties' and who are not."

See *Krocse* v. *General Castings Corporation*, 179 F. 2d 760, 761-2 (3d Cir., 1950), *cert. den.*, 339 U. S. 983; *Hertz* v. *Record Publishing Company of Erie*, 219 F. 2d 307, 309-400 (3d Cir., 1955), *cert den.*, 349 U. S. 912; *Christian* v. *Texas Gas & Power Corp.*, 14 F. R. D. 80 (N. D. Tex. 1952).

The courts below were right in their conclusion that if the action did in fact involve interests in real property, Fox Realty was then an indispensable party under Rule 19 of the Federal Rules of Civil Procedure. The courts below were wrong in failing to apply the clear-cut California law. Under California law the interests of respondents—and the interest of Fox Realty—are interests in real property.

(b) The Texas District Court lacked jurisdiction to try a local action involving interests in California real property.

The gravamen of this action is respondents' effort to establish the magnitude of their claims to the proceeds of oil and gas production from real property situated in California. The action therefore involves a determination of the quantum of respondents' rights which necessarily includes a determination of conflicting claims to the real property. The required determination makes this a "local" as distinguished from a "transitory" action. As such, it can be tried only by a court sitting where the real property is located. "No real action or action to recover possession of a tangible thing, whether land or chattel, can be maintained outside the state where the land or chattel is situated." Restatement, Conflict of Laws § 613.

The distinction between "local" and "transitory" actions is recognized by the Judicial Code. Section 1392 thereof provides that "any civil action, of a local nature, involving property located in different districts in the same state, may be brought in any of such districts." 28 U. S. C.

The Texas conflicts law holds that the law of the place of execution and performance is determinative of contract rights, e.g., *Consolidated Garage Co.* v. *Chambers*, 111 Tex. 293, 231 S. W. 1072, 1073 (1921); *Fidelity Mutual Life Ass'n* v. *Harris*, 94 Tex. 25, 57 S. W. 635 (1900), and that the law of the situs governs interests in real property, *e.g.*, *Toledo Soc. for Crippled Children* v. *Hickok*, 152 Tex. 578, 261 S. W. 2d 692 (1953), *cert. den.*, 347 U. S. 936 (1954).

§ 1392(b); *cf.* 28 U. S. C. § 1393. The leading case is *Livingston* v. *Jefferson*, 15 Fed. Cas. 660, No. 8411 (C. C. D. Va. 1811), in which Chief Justice Marshall participated while on circuit. This was a suit brought in the Circuit Court of Virginia against Thomas Jefferson for trespass to land located in the territory of Orleans (New Orleans). The court held that the common law distinction between local and transitory actions limited the jurisdiction of the federal courts and dismissed the action on the ground that the court sitting in Virginia could not try trespass and title to property located elsewhere. *Livingston* v. *Jefferson* thus limits the jurisdiction of the federal courts. See generally Note, "Local Actions in the Federal Courts," 70 Harv. L. Rev. 708 (1957); see *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105 (1894); *Guarantee Trust, etc. Co.* v. *Delta & Pine Land Co.*, 104 Fed. 5, 9, 12 (5th Cir. 1900), *cert. den.*, 180 U. S. 636 (1901); *Boyce's Executors* v. *Grundy*, 9 Pet. 275, 289 (1835); *Robinson* v. *Seatex Oil Co.*, 57 F. Supp. 581, 582 (N. D. Tex. 1944).

Since the affected real property in this case is located in California, a California court and *only* a California court, would have jurisdiction. Accordingly, the District Court was without jurisdiction.

3. By affirming the District Court's denial of petitioner's motion to transfer the action to the Southern District of California, the Court of Appeals sanctioned a radical departure from accepted standards of judicial procedure, the effect of which is to nullify 28 United States Code, Section 1404(a). The failure to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision.

The generous provisions of the general venue section of the Judicial Code (28 U. S. C. § 1391), which properly assure plaintiffs a forum in which to sue corporate defen-

dants, subject such defendants to suit in any district in which they "do business." The breadth of the "doing business" concept is such (see *e.g., International Shoe Co.* v. *State of Washington*, 326 U. S. 310 [1950]; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 [1957]) that national corporations are exposed to suit in forums with which they, and the transaction out of which the action arises, may have only minimum contacts.* The invitation to rampant forum shopping is apparent; the federal antidote is 28 U. S. C. § 1404(a). *Torres* v. *Steamship Rosario*, 125 F. Supp. 496, 497 (S. D. N. Y. 1954), *mandamus den. sub. nom. Torres* v. *Walsh*, 221 F. 2d 319 (4th Cir. 1955), *cert. den.*, 350 U. S. 836; *Henderson* v. *American Airlines*, 91 F. Supp. 191, 192 (S. D. N. Y. 1950).

Section 1404(a)—the principal device available to combat forum shopping—requires a vigorous application to accomplish its evident purpose. It does not confer unreviewable discretion upon the district courts to proceed with whim and caprice in its application. Rather it confers a reasoned and controlled discretion to be exercised in accordance with recognized standards.

The classic catalogue of the principal factors to be considered is contained in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501 (1947). Holding that *forum non conveniens* is operative in the federal courts because the liberal federal venue policy "may admit those who seek not simply justice but perhaps justice blended with some harassment" (330 U. S. at 507), this Court identified the private interests of the litigants and the public interest in fair judicial administration as the rubrics controlling its application. The major

*Petitioner, for example, distributes motion pictures in Texas, as in all other states. It maintains a film exchange in that state. These are the only contacts of petitioner with Texas—sufficient to be sure for purposes of suing petitioner on any transitory cause of action arising anywhere.

factors under the "private interest" are: (1) ease of access to sources of proof; (2) availability of compulsory process for attendance of unwilling witnesses; (3) cost of obtaining willing witnesses; (4) possibility of viewing premises where appropriate; (5) other practical factors affecting ease, expedience and expense of trial; and (6) difficulties of enforcing judgment. Under the "public interest," the factors are: (1) Congestion of calendars caused by trying cases away from the places where the controversy originates; (2) "Jury duty * * * ought not to be imposed upon the people of a community which has no relation to the litigation" (330 U. S. at 508); (3) "There is a local interest in having localized controversies decided at home" (330 U. S. at 509); (4) "There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." (*Ibid.*)

Gulf Oil preceded Section 1404(a). The remedy under *Gulf Oil* for the inconvenient forum was dismissal, with the possible consequence of defeating the plaintiff's action because of the running of the statute of limitations. Because of the harshness of the remedy, this Court, in *Gulf Oil*, said that the balance of convenience must be strongly in favor of the defendant to disturb plaintiff's choice of forum (330 U. S. at 508). Section 1404(a) converted the remedy from dismissal to transfer, thereby obviating the potential harshness inhering in the doctrine. Accordingly, this Court has held that Section 1404(a) broadens the discretion of the district courts in favor of granting the motion for transfer. In other words, a lesser showing of inconvenience is now required. *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 32 (1955). A major consequence is that the plaintiff's choice of forum is no longer a dominant factor to be considered. *Lemon* v. *Druffel*, 253 F. 2d 680 (6th Cir. 1958), *cert. den.*, 358 U. S. 821.

It is hard to imagine a case more demanding of the protection of Section 1404(a) than the instant case. On substantially every ground specified in *Gulf Oil*, this case should have been transferred to California. All of the operative facts out of which the action arises took place in California. Only one of the respondents is a citizen of Texas and his small interest in the case was acquired contemporaneously with the filing of the action. The owners of the principal shares of the claim—and the persons familiar with and involved in the controversy—are citizens and residents of California. The 1943 contracts were negotiated, made and performable in California. The persons familiar with the negotiations of the contracts are residents of California and New York. The persons familiar with the Universal lease are residents of California. No lay witnesses were residents of Texas. The compulsory process of the Texas court could not reach a single lay witness who testified at the trial, not to mention those who did not testify. Important evidence had to be offered by depositions. Documentary evidence was voluminous and was located in California and New York. None of it was in Texas. The real property involved is in California. The case involves difficult questions of California law, with which the Texas courts have no special familiarity. In summary, the dispute is a local California dispute having nothing whatever to do with Texas. Texas was no more appropriate a forum than Vermont, Idaho or Florida. Texas was "chosen" out of considerations which involved nothing more than egregious forum shopping.

The Court of Appeals upheld the District Court on the ground that the trial judge gave consideration to the various factors by holding a hearing—thereby properly exercising the discretion afforded by Section 1404(a). A reading of the District Court's opinion (Appendix, p. 39a-42a) belies the assumption of the Court of Appeals. The District Court denied the motion because (1) plaintiffs'

choice of forum should be respected; (2) Texas is "a pioneer in the oil business"; (3) testimony by deposition in a contract case is just as good as oral testimony; and (4) the time required to reach trial is less in the Northern District of Texas than in the Southern District of California. There is not a word about the controlling effect of California law, the fact that the case reflects a California controversy or the other factors enumerated in *Gulf Oil*. And each of the factors relied upon by the District Court is unsound as a matter of law.

Whatever deference is still paid to a plaintiff's choice of forum is applicable only where the plaintiff's choice is his own home forum. *E.g., Cressman* v. *United Air Lines*, 158 F. Supp. 404, 407 (S. D. N. Y. 1958); *Calva* v. *American Airlines, Inc*, 177 F. Supp. 238, 239 (D. Minn. 1959). Texas is not the home forum of any of the respondents, with the single exception of respondent Teas, to whom a small interest was assigned the day before the complaint was filed and who admitted he "was buying a speculative thing—an interest in a lawsuit". (Teas Deposition, p. 23). Moreover, where the forum has no local interest in the parties or subject matter, and none of the operative facts occurred within it, plaintiffs' choice is entitled to only "minimal" consideration. *Chicago, Rock Island & Pacific Railroad Co.* v. *Igoe*, 220 F. 2d 299, 304 (7th Cir. 1955), *cert. den.*, 350 U. S. 822; *Morgan* v. *Illinois Central Railroad Co.* 161 F. Supp. 119, 120 (S. D. Tex. 1958); *Boggess* v. *Columbian Rope Co.* 167 F. Supp. 854, 857 (S. D. N. Y. 1958).

That Texas is a "pioneer" in the oil business is totally irrelevant. Indeed, if anything, the importance of oil and gas law in Texas is a reason for transferring the action to California, since the underlying nature of oil and gas interests in Texas is radically different from that prevailing in California. Texas recognizes oil and gas rights as

property "in place" (*e.g., Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717 [1915]), while California follows the non-ownership or qualified ownership theory. *E.g., Callahan* v. *Martin*, 3 Cal. 2d 110, 43 P. 2d 788 (1935).

The assumption of the District Court that testimony by deposition "is just as desirable" (Appendix, p. 42a) as oral testimony contradicts this Court's recognition in *Gulf Oil* that trial by depositions creates "a condition not satisfactory to court, jury or most litigants." (330 U. S. at 511).

Finally, the District Court's resort to the comparative state of the calendars in the two districts makes determinative a factor "to which great weight is (never) assigned." *Peyser* v. *General Motors Corp.*, 158 F. Supp. 526 (S. D. N. Y. 1958). Where the nature of the case is such that an early trial is important, congestion of trial calendars may be given some weight. *E.g., Fannin* v. *Jones*, 229 F. 2d 368, 370 (6th Cir. 1956), *cert. den.*, 351 U. S. 938. But, here, the variable participating royalty had not even accrued when the action was commenced and tried. A few months difference in trial dates was not consequential.*

The Court of Appeals, in upholding the District Court, erroneously assumed that the holding of a hearing and "considering" the factors constituted an unreviewable exercise of discretion by the District Judge. Such a view, in effect, confers uncontrollable discretion on the lower federal courts which, as here, can lead to the erosion of the important protective policy represented by Section 1404(a). Where the facts in connection with the decision on transfer

*Moreover, the actual difference in relative calendar congestion was not significant. In the Northern District of Texas, the median lapse of time between filing and trial was 5½ months while in the Southern District of California it was 11 months. Annual Report of the Director of the Administrative Office of the United States Courts, 1958, pp. 179, 181. On a comparative basis with other districts, the calendars of each of these districts were relatively clear. Actually, 12 months elapsed between filing and trial—longer than the median in either district.

are undisputed, as here, the reviewing court must assure itself that the District Court gives proper weight to the various factors. The record here speaks eloquently that the District Court failed to exercise a reasoned discretion in accordance with the applicable standards. When that occurs, a denial of a motion to transfer should be reversed. *E.g., Southern Railway Co. v. Madden*, 235 F. 2d 198, 201 (4th Cir. 1956), *cert. den.*, 352 U. S. 953; *Chicago, Rock Island & Pacific Railroad Co. v. Igoe*, 220 F. 2d 299 (7th Cir. 1955) *cert. den.*, 350 U. S. 822.

The failure of the District Court to transfer the action constituted an abuse of discretion so marked as to warrant the exercise by this Court of its power of supervision.

CONCLUSION

For the reasons advanced above the petition for a writ of certiorari should be granted.

Respectfully submitted,

NETH L. LEACHMAN
IRVING M. WALKER
WILLIAM F. KOEGEL
HOWARD I. FRIEDMAN,
Attorneys for Petitioner

ROYALL, KOEGEL & ROGERS,
Of Counsel.

May 18, 1961